high water
a floodplain management newsletter

Volume 29 September 1987

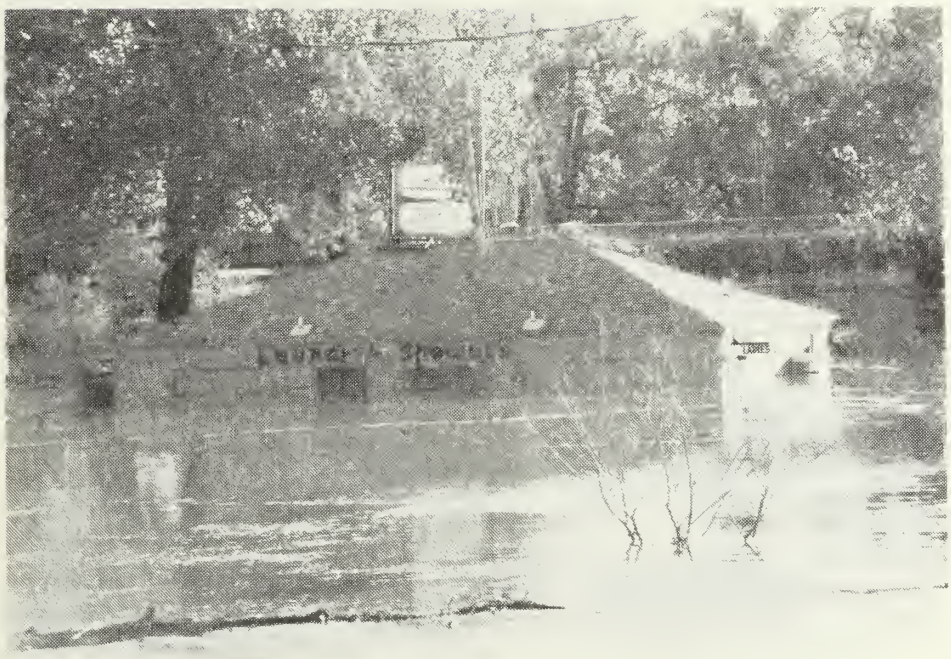
Supreme Court decision on taking: not a landmark decision

The newspapers said it was a landmark decision "for which the developers have been waiting." Taking a closer look, Jon Kusler,

"Unfortunately a number of lawyers who had not even read the case described it to papers as a landmark decision of the most ominous proportions."

attorney and expert on floodplain issues, writes, "Unfortunately, a number of lawyers who had not even read the case described it to papers as a landmark decision of the most ominous proportions, adding to public misunderstanding and confusion." When floodplain managers and the Federal Emergency Management Agency have had a chance to review the facts of the case, it may not prove to be the landmark decision touted by the newspapers.

Photo courtesy of Phillips County News.



Did somebody leave the water running? The owners of the Bon Soir campgrounds in Malta didn't find their problem humorous during the flooding of 1986.

The California case concerned an outdoor recreation camp for handicapped children that is owned by the First Lutheran Church. The camp was destroyed by flooding in 1978. Shortly after the '78 flood, Los Angeles County adopted interim floodplain regulations prohibiting reconstruction and new construction in the area. The church sued Los Angeles County based on several theories, the principal claim being that the regulation was a "taking of property." A "taking of property" (or "taking") refers to any removal of private property rights for public use that calls for monetary or other just compensation. The case was appealed to the U.S. Supreme Court.

"The Supreme Court did not hold that the land use regulations in question were a taking."

Kusler explains that the Supreme Court did not hold that the land use regulations in

question were a taking. The case never went to trial on the facts, and the validity of the floodplain regulations was never determined by the lower courts or Supreme Court. The single issue in the case appealed to the Supreme Court was very narrow and addressed the legal remedies available to the church IF the regulations were a taking. The lower California court previously held that based on earlier cases the church couldn't possibly recover damages for a temporary taking. IF the regulations were a taking, the only remedy for the landowner was to receive the desired permit or have the regulations changed. This was the decision appealed to the Supreme Court. The U.S. Supreme Court, faced with this hypothetical taking, reversed the California Court and held IF the regulations were unconstitutional as a taking, LACounty would be responsible for TEMPORARY DAMAGES. The Court did not consider how those damages should be measured. The case has been remanded to the California courts to determine whether a taking of property had occurred.

"A loose cannon likely to result in a great deal of unproductive litigation."

This highly complicated case raises more questions than it answers. Dissenting Chief Justice Stevens called the case a "loose cannon" likely to result in a great deal of "unproductive litigation."

There are a number of issues the Supreme Court **did not** decide. Most important, they did not formulate a new test for taking and didn't overrule any earlier cases of the court. The case, therefore, must be read in conjunction with earlier cases, in which the Supreme Court has ruled that:

- regulations adopted for a valid public purpose may substantially reduce land values without a taking;
- impact of regulations on an entire property must be evaluated in determining whether a taking has occurred;
- public safety and the prevention of nuisances is a paramount concern of government and no landowner has a property right to threaten public safety or cause nuisances;
- in general, regulations are a taking only if they deny "all use" or all "economic use" of an entire property including "investment-backed expectations."

On June 12, 1987 Susan Kantor Bank, the General Counsel for the Federal Emergency Management Agency, issued an official analysis of the Supreme Court case. She concluded that the National Flood Insurance Program regulations could probably successfully withstand a constitutional challenge. This analysis is based on the fact that the flood insurance program regulations seek to preserve life and property and do not deny all uses of the floodplain. We spoke with Susan Bank to find out what she thought would happen next. She said "the circuit courts may go in different directions on the taking issue — the Supreme Court will eventually have to hear a taking case and clarify what is a taking of property."

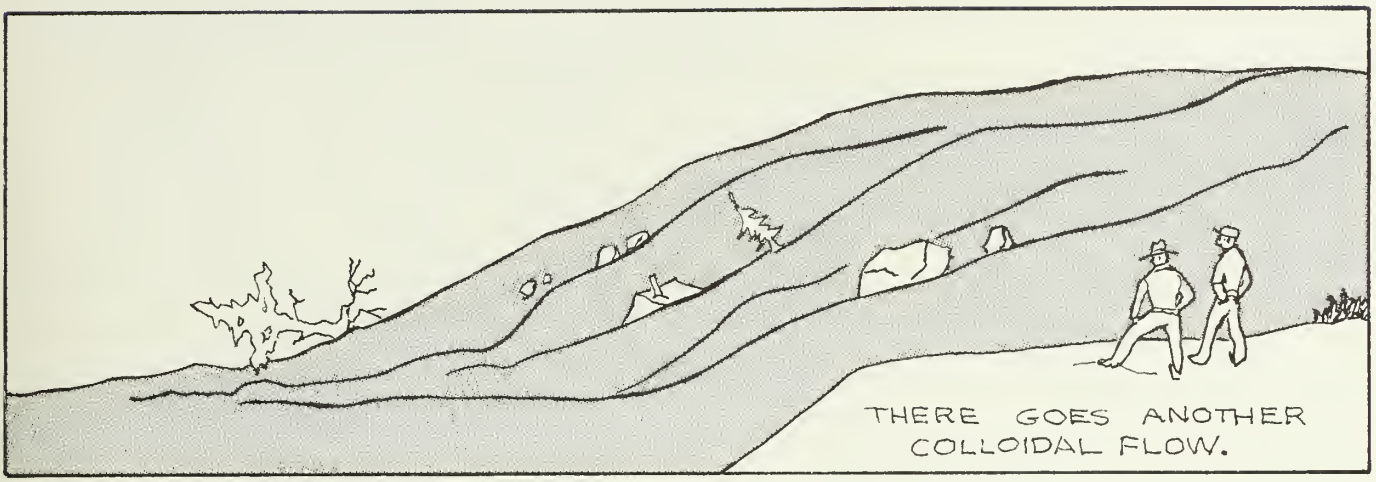
"Remain confident that soundly conceived floodplain regulations will continue to be sustained at all levels."

Jon Kusler gives some advice on what actions floodplain managers should take in light of the case. He says to "stay calm, and view the case for what it is and is not. Remain confident that soundly conceived floodplain regulations . . . will continue to be sustained at all levels." From a legal perspective not much has changed. It is almost certain that even the extreme regulations involved in this case will be sustained once tried on the facts. Kusler recommends following the normal precautions to avoid a "taking," which many of you have been using for years, when land values are high and impacts on the landowner are severe.

- Emphasize health and safety considerations and prevention of nuisances in your regulations and written findings for individual permit denials. Actions tied to these objectives have been upheld.
- Tie in your regulations with national or statewide programs such as the National Flood Insurance Program and Montana Floodplain and Floodway Management Act. Courts have been willing to sustain these regulations.
- Apply large lot zoning (for example, 2 to 10 acres) to floodplain areas where appropriate and possible. Courts have held regulations that permit some reasonable use on an entire property are not a taking.
- Provide a variance or "special permit" procedure in your regulations. They provide the agency with an opportunity to deal with extreme hardships.
- Carefully document the need for regulations and reasons for permit denials, especially in urban or high land-value areas.
- Encourage preapplication meetings with landowners to formulate mutually acceptable project designs.
- Apply your regulations in a consistent and equitable manner. Maximize your opportunities for notice and public hearings.
- If you adopt a moratorium, a suspension of any development activity, do so for a fixed period and make sure your reasons are clear and legitimate.
- Coordinate regulatory, tax, and public works policies to insure the fiscal burden on landowners is consistent with permitted uses.
- In extreme circumstances, apply transferable development rights to help relieve the burden on landowners.
- Look into acquisition programs where active public use is needed for land or a single landowner or group of landowners must bear disproportionate burdens for public good.

If you would like more information about this case or have questions about your local ordinance, please contact the Floodplain Management Section staff.

(Portions of this article have been taken from the *News and Views,* Association of State Floodplain Mangers, July 1987.)



Floods are forbidden

There will be no flooding in Utah this spring despite record snowpacks.

The no-flood guarantee comes courtesy of the Salt Lake County Development and Promotion Division, the Utah Travel Council, and the Salt Lake Area Chamber of Commerce. The Associated Press said that all three have urged the Utah media to call whatever happens this spring "heavy runoff" instead of "flooding."

Utah's tourist economy was hurt last spring by loose talk of flooding accompanied by pictures of rivers running down Salt Lake City's major street. This year, the promoters hope, there will be no loose talk and no damaging pictures.

The only problem is, they haven't gone far enough. It's not just "flood" that chases off tourists. Fickle travelers may also be turned into stay-at-homes by the words: drowning victims, mudslides, and dam failure. So, as a public contribution, *High Country News* suggests:

Drowning be called "excess inhalation of water."

Mudslides should become "heavy water-dirt colloidal flows."

Dam breaks are better described as "rapid redeployment of water impoundment structures," or "semi-anticipated reallocation of impoundment to Lake Mead" or whatever reservoir lies downstream and can withstand the surge.

Photos of homes floating in new lakes or of submerged cars probably have to be published because of freedom of the press. But captions should be upbeat:

"Mr. and Mrs. Jones say they're not at all sad to see their house swept away by heavy runoff. 'We were sick of it anyway. It needed painting and you wouldn't believe the heating bills. Good riddance.' "

Or, when a main street is shown covered by three feet of water: "Shadduck merchants invited visitors to come celebrate the annual spring heavy runoff — a fertility rite, a la the pre-Aswan heavy runoff of the Nile."

Towns could also put on appropriate plays. Ibsen's *The Enemy of the People* would be wonderful if, instead of the populace hounding a doctor, it showed a chamber of commerce running out a newspaper that insisted on reporting the flooding.

(Reprinted from the *High Country News*, March 5, 1984.)

Send us your comments on floodplain rule changes

We are working on revisions to the floodplain administrative rules. These rules, established by the Board of Natural Resources and Conservation, set out floodplain management regulations and enforcement for local floodplain programs and the Department of Natural Resources and Conservation. The rules also cover floodplain delineations and floodplain development standards.

A public hearing must be held before any changes can be made. The Board of Natural Resources and Conservation must approve any new rules or changes to existing rules.

One revision supported by several communities is to remove the $25 limit for floodplain permit fees. We would like you to take a little time to look at the administrative rules and make suggestions for changes. A copy of the rules can be found on pages 125 through 144 in the Floodplain Management Guidebook. If you don't have a guidebook give us a call or check your local library for a copy of the Administrative Rules of Montana, sections 36.15.101 through 36.15.903. Your comments will be helpful. We want to make the rules work for you. Please direct your comments by November 1 to John Hamill or Deeda Richard, Floodplain Management Section, 444-6646.

1986 Federal Disaster Expenditures

According to the Federal Emergency Management Agency a half-billion dollars in federal aid will be distributed to individuals and local governments affected by natural disasters in 1986. Federal obligations will total $540.7 million when approved recovery projects are completed.

Flooding, the major cause of disasters in 1986, will total damages of $5.6 billion. Seventeen of these flooding events resulted in presidential disaster declarations with claim payments of over $52 million from the Federal Emergency Management Agency's flood insurance fund. (Taken from *Floodlines*, Office of the North Dakota State Engineers.)

Floodplain Management Section Staff:

John Hamill, Supervisor

Deeda Richard, NFIP Coordinator and Newsletter Editor

Phone: (406) 444-6646/6654/6655

Volume 29 September 1987

high water

Floodplain Management Section
Montana Department of Natural Resources and Conservation
1520 East Sixth Avenue
Helena, MT 59620-2301

Funding for this newsletter was provided by the Federal Emergency Management Agency. Statements contained in it are the responsibility of the Floodplain Management Section of the Department of Natural Resources and Conservation.